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No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD H. GONSALVES, PETITIONER,

VS.

CATERPILLAR TRACTOR COMPANY, INC., RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether Section 4(f)(2) of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §621 *et seq.*, as originally enacted, permitted an employer discretion to involuntarily retire an employee by reason of age before the mandatory age specified in a bona fide plan predating the ADEA, where the plan's terms expressly allow, but do not require, early involuntary retirement.*

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* Parties to the proceedings: Donald H. Gonsalves, Petitioner. Caterpillar Tractor Company, Inc., Respondent.

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OPINIONS BELOW

The opinion of the United States District Court Central District of Illinois is reported at 22 FEP Cases 967 (C.D. Ill. 1980) and is printed in the Appendix hereto, *infra,* at 1a-5a. The judgment of the United States Court of Appeals for the Seventh Circuit is reported at 24 FEP Cases 687 (7th Cir. 1980) and is printed in the Appendix hereto, *infra,* at 1b-8b. The opinions are not reported in the federal reports.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was decided and entered November 24, 1980. Jurisdiction is this matter is conferred by 28 U.S.C. § 1254(1).

STATUTES AND REGULATION INVOLVED

STATUTES

Section 2(b) of the Age Discrimination in Employment Act of 1967 (ADEA).

> (b) It is therefore the purpose of this Act [§§ 62; and notes-634 of this title] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment. (Dec. 15, 1967, P.L. 90-202, § 2, 81 Stat. 602.) 29 U.S.C. § 621(b)

Section 4(a)(2) of the ADEA

> (a) It shall be unlawful for an employer —

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or . . . 29 U.S.C. § 623(a)(2)

Section 4(f)(2) of the ADEA

(f) It shall not be unlawful for an employer, employment agency, or labor organization —

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual. 29 U.S.C. § 623(f)(2)

REGULATION

Department of Labor regulation, 29 C.F.R. § 860.110(a)

(a) Section 4(f)(2) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *." Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section

4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar, as the exception provided in section 4(f)(2) is concerned.

STATEMENT OF THE CASE

On June 1, 1977, petitioner, Donald H. Gonsalves, at fifty-nine years of age and after nearly forty-one years of service, was involuntarily retired from respondent's Caterpillar Tractor Company's employ several years before the mandatory retirement age specified in his employer's Retirement Income Plan (hereinafter referred to as the "Plan"). Petitioner was retired at the option of his employer pursuant to terms in the Plan permitting but not requiring early retirement. Under the terms of the Plan, respondent retained an option to (in its discretion) retire early, any employee who had obtained thirty years of credited service regardless of age, or ten years of credited service and at least fifty years of age. Apart from these qualifying terms, the Plan contained no guidelines delineating the circumstances under which an employee is selected for early retirement.

The petitioner and respondent agree that the Plan was bona fide, in the sense that it existed and paid out benefits, and that the Plan was established well before passage of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621, *et seq*.

On May 25, 1979, petitioner instituted the instant action in the United States District Court Central District of Illinois alleging that he was separated from respondent's employ by reason of his age, in violation of the ADEA. Respondent moved for summary judgment arguing that it could not have violated the ADEA as a matter of law, because § 4(f)(2) of the ADEA, as originally enacted, continued to allow involuntary retirement pursuant to a bona fide plan predating the Act. The District Court rejected petitioner's argument that § 4(f)(2) did not permit an employer discretion to involuntarily retire an employee because of age if the Plan itself did not mandate early retirement at a specified age.

The District Court granted respondent's motion for summary judgment and dismissed petitioner's complaint. The Seventh Circuit Court of Appeals affirmed, holding that § 4(f)(2) permitted involuntary early retirement at the employer's option so long as the terms of the plan were clear to the employees, and the option was contained in a bona fide plan, predating the ADEA. See Appendix hereto, *infra*, at 5b.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW CONCERNING THE APPLICATION OF 29 U.S.C. § 623(f)(2), AS ORIGINALLY ENACTED, WHICH HAS NOT, BUT SHOULD BE IMMEDIATELY RESOLVED BY THE UNITED STATES SUPREME COURT.

This Court is requested to resolve an issue of statutory construction acknowledged but not decided in *United Air Lines, Inc.* v *McMann*, 434 U.S. 192 (1977), concerning the application of Section 4(f)(2) of the Age Discrimination in Employment Act of 1967 (ADEA) prior to its amendment in 1978. In *United Air Lines, Inc.* v *McMann*, 434 U.S. at 203, a majority of this Court held that § 4(f)(2) permitted mandatory retirement before age 65, under the terms of a bona fide plan, instituted in good faith before passage of the ADEA. This court, however, did not decide whether § 4(f)(2) permits involuntary early retirement by reason of age, where the employer's plan makes early retirement optional. *McMann, supra*, at 197, n. 4.

Inherent in this unanswered question are two issues unique to optional retirement plans, and vital to the proper enforcement of the ADEA. First, after passage of the ADEA, does an employer "observe" the terms of a bona fide retirement plan, as required by § 4(f)(2), if it retains an option to selectively enforce its provisions? Secondly, may the optional terms of a plan predating the ADEA be used as a subterfuge to conceal a present intent to discriminate on the basis of age?

The resolution of these issues is of critical and immediate importance to the petitioner and numerous American workers involuntarily retired at their employers' option, before the mandatory age specified in their retirement plans, and prior to the 1978 amendment of § 4(f)(2),[1] prohibiting involuntary retirement on account of age. Although one would suspect the 1978 amendment to § 4(f)(2) and the statutes of limitation have mooted these issues, numerous reported opinions suggest a large number of pending cases remain, involving individuals retired before 1978, at their employers' option.

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[1] As amended in 1978, 29 U.S.C. § 623(f)(2) reads in relevant part:

> "(f) It shall not be unlawful for an employer, employment agency, or labor organization —
>
> * * *
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, . . . and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual."

Additionally, it is significant to note that several states have statutory provisions patterned after former § 4(f)(2).[2] If the question presented in the instant petition is not resolved by this Court, it will likely continue to be a source of litigation, albeit in the context of state law, inasmuch as an ADEA claimant is first required to commence proceedings under state law. See, 29 U.S.C. 633(b).

Yet if this question only involved the rights of the petitioner it would be manifestly unfair to deny him relief because a later amendment has cured this problem for the majority. Living on a fixed income and disadvantaged in his attempt to find compatible employment, petitioner finds very little solace in the fact that many of his fellow workers enjoy rights he is denied.

Subsequent to this Court's opinion in *McMann*, district courts in *Hannan* v *Chrysler Motors Corp.*, 433 F. Supp. 802 (E.D. Mich. 1978); *Cowlishaw* v *Armstrong Rubber Co.*, 450 F. Supp. 148 (E.D. N.Y. 1978); *Marshall* v *American Motors Corp.*, 475 F. Supp. 875 (E.D. Mich. 1979); and *Langman* v *Western Electric Co.*, ____ F. Supp. ____, 23 FEP Cases 1222 (S.D. N.Y. 1980) held that § 4(f)(2) does not automatically exclude ADEA coverage if an employer chooses to retire an employee because of age, pursuant to terms in a plan permitting, but not requiring involuntary retirement. In each of the above cases the district court focused its analysis on the reasons which prompted an employer to exercise its option.

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[2] See, District of Columbia: Human Rights Act, Sec. 212, 6 D.C. Code 22; Maryland Fair Employment Practice Act, 49 B Maryland Code Annotated, Sec. 16(g)(4); Oregon: Fair Employment Practice Act, Sec. 659.028, S.B. 358, Ch. 843 L(1979); South Carolina: Human Affairs Law, Sec. 1-13-80(h)(7)(ii), H.B. 3370 L 1972, amended by S.B. 217, Laws of 1979: Utah: Anti-Discrimination Act, Sec. 34-535-6(3), S.B. 8, Laws of 1979.

For example, in *Marshall* v *American Motors Corp.*, 475 F. Supp. at 880, the district court recognized that mandatory and optional retirement provisions differ in one fundamental respect. Optional terms by their nature permit the exercise of discretion; mandatory terms do not. The court held that an employer violates the ADEA if the selection process is based upon impermissible criteria such as age. The court explained:

> "The plan did not mandate retirement . . . Rather the plan provided for the exercise of discretion by the employer. After passage of the act, one element of the employer's discretion was removed. That was the right to consider age as a relevant factor in the decision to terminate an employee." *Id* at 880.

Similarly, the district court in *Hannan* v *Chrysler Motors Corp.*, 443 F. Supp. at 804, held that the word "observed" as utilized in § 4(f)(2) denoted passive acquiescence to the plan's terms, and was not intended by Congress to permit selective enforcement because of an employee's age. This same conclusion was reached by the Secretary of Labor as early as 1975. In a report to Congress, the Secretary took the official position that early retirement was unlawful unless it is, "required by the terms of the plan and is not optional . . .", Dept. of Labor, January, 1975. report at 17 (1975).

The court of appeals panel below, as well as those of the third, fifth, seventh, and ninth circuits have rejected the distinction between mandatory and discretionary plans identified by the district courts cited above, and advocated by the petitioner here. See, *Jensen* v *Gulf Oil Refining Co.*, 623 F. 2d 406 (5th Cir. 1980); *Minton* v *Whirlpool Corp.*, 569 F. 2d 1012 (7th Cir. 1978); *Marshall* v *Hawaiian Telephone Co.*, 575 F. 2d 763 (9th Cir. 1978). See also, *Zinger* v *Blanchette*, 549 F. 2d 901 (3rd Cir. 1977). In the view of the court of appeals below and the circuits referenced above, § 4(f)(2) serves to perfunctorily exclude ADEA coverage to any individual

severed from employment pursuant to specified retirement terms, so long as the plan is bona fide and predates the ADEA. This result is obtained regardless of the employer's motives, or that the terms are selectively enforced and are broad enough to encompass virtually every protected individual in its employ.

This construction of § 4(f)(2) may only be countenanced if the ADEA is interpreted to permit involuntary retirement by reason of age, so long as substantial benefits are paid. See, *Zinger* v *Blanchette*, 549 F. 2d at 910. Such an interpretation in the context of optional retirement plans, however, ignores the prohibitory language of section 4(a)(2) which makes it unlawful for an employer to, "limit ... or classify his employees in any way which would adversely affect his status as an employee, because of such individual's age, ..." 29 U.S.C. 623(a)(2).

The instant petition provides this Court with an opportunity to re-examine § 4(f)(2), as it relates to optional retirement plans, and close what has too often proved to be a substantial loophole in the law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 13, 1981.

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS—
SPRINGFIELD DIVISION

DONALD H. GONSALVES,
Plaintiff,

v. NO. 79-1084

CATERPILLAR TRACTOR COMPANY,
Defendant.

MEMORANDUM ORDER
(Filed March 26, 1980)

Plaintiff Donald H. Gonsalves brings this suit pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq*. The plaintiff claims the Act was violated when he was involuntarily retired effective June 1, 1977 under the terms of defendant Caterpillar Tractor Company's retirement plan. Currently before this Court is the defendant's motion for summary judgment. Having carefully considered the pleadings, memoranda, exhibits and applicable law, I conclude that the motion is well taken and that the defendant is entitled to summary judgment.

Section 4(a) of the Act, 29 U.S.C. § 623(a), forbids the employer from discriminating against an employee because of the employee's age. On June 1, 1977 when the plaintiff was retired, Section 4(f)(2) of the Act provided an exception to this prohibition:

> It shall not be unlawful for an employer . . . (2) to observe the terms of a bona fide seniority system or

> any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter . . .

29 U.S.C.A. § 623(f)(2) (1975). There is no dispute that Caterpillar's retirement plan is bona fide, and that it is not a subterfuge to evade the purposes of the Age Discrimination in Employment Act. The defendant therefore relies upon the Section 4 (f)(2) exception to argue that the plaintiff's involuntary retirement did not violate the Act.

The defendant's position is supported by the opinion of the United States Supreme Court in *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977). In *McMann*, the Supreme Court resolved a conflict between the Fourth and Fifth Circuits in holding that involuntary retirement of an employee under the age of 65 under the provisions of a bona fide retirement plan established prior to enactment of the Age Discrimination in Employment Act was permissible. The Court there stated:

> [W]e find nothing to indicate Congress intended wholesale invalidation of retirement plans instituted in good faith before its passage, or intended to require employers to bear the burden of showing a business or economic purpose to justify bona fide pre-existing plans . . .

McMann, 434 U.S. at 203.

The plaintiff relies primarily upon a 1978 amendment to the Act in claiming that the defendant is not entitled to the exception afforded by Section 4 (f)(2). In this amendment, Congress apparently took exception to the *McMann* decision by adding language to Section 4(f)(2) of the Act to provide that no retirement plan, whether bona fide or not, "shall require or permit the involuntary retirement of any individual . . . because of the age of such individual." 29 U.S.C.A. §

623(f)(2) (Supp. 1979). The plaintiff asks this Court to give this amendment, which the plaintiff characterizes as a *clarification* of earlier Congressional intent, retroactive effect to apply to the plaintiff's June 1, 1977 retirement.

The plaintiff's position is supported by the opinion in *Davis v. Boy Scouts of America*, 457 F. Supp. 665 (D.N.J. 1978). While specifically refusing to characterize his ruling as giving the 1978 amendment retroactive application, Judge Fisher nevertheless stated:

> While the final authority as to the meaning of any federal law is the United States Supreme Court, a decision of that Court is subject to change both by the Court itself or by Congress. Here, the Congress has seen fit to change the interpretation of the ADEA given by the Supreme Court, *see United Air Lines, Inc. v. McMann*, 434 U.S. 192, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977), to comport with what it says was its original intent. This change, in the state of the law, is analagous [sic] to a reversal by the Supreme Court of an earlier decision in that the inferior federal courts become bound to apply the law as revised, not as it was sometime earlier.

Davis, 457 F. Supp. at 673. Thus, Judge Fisher applied the 1978 amendment to plaintiff Davis who had been involuntarily retired on July 1, 1976. As a result, the Court ultimately concluded that the alleged conduct was proscribed. *See also, Marshall v. American Motors Corp.*, 475 F. Supp. 875, 879-81 (E.D. Mich. 1979).

While the *Davis* opinion has superficial appeal, I conclude that the better-reasoned rule is found in *Marshall v. Baltimore & Ohio R.R.*, 461 F. Supp. 362 (D. Md. 1978). That decision carefully details the applicable law as well as the legislative history of Section 4(f)(2) of the Act, and con-

cludes that the 1978 amendment is not to be given retroactive effect. In so ruling, the court specifically refuses to follow the inference relied upon by the *Davis* court that because the 1978 amendment was intended to clarify the earlier law, it should be given both prospective and retrospective effect. 461 F. Supp. at 380 n.2. *See also, Marshall v. Delaware River and Bay Authority,* 471 F. Supp. 886, 881-91 (D. Del. 1979). I note further that the *Baltimore & Ohio R.R.* opinion is relied upon by the Court in *Strattman v. N.L. Industries, Inc.,* No. 79-1231, 21 F.E.P. 1633 (D.N.J. January 23, 1980), where a different judge of the same court specifically rejects the *Davis* opinion.

For the reasons stated in the *Baltimore & Ohio R.R.* case, I conclude that it would be improper to afford the amendment retrospective application under the circumstances here presented. I have also considered the plaintiff's contentions that *McMann* only applies to plans with mandatory retirement requirements and not the discretionary type here involved, *see Marshall v. A.M.C.,* 475 F. Supp. 875, 880 (E.D. Mich. 1979), and that the 1978 amendment should be applied retroactively unless the defendant can show prejudice as was shown in the *Baltimore & Ohio R.R.* case. I find these arguments do not compel an opposite result under the circumstances here presented.

I note, parenthetically, that my conclusion that the 1978 amendment should not be afforded retrospective application under these circumstances renders it unnecessary to address the issues raised as to whether plaintiff has complied with the notice requirements of 29 U.S.C. § 626(2). In my order of October 17, 1979, I held that the statutory notifications period was not absolute in that under proper circumstances, it was subject to being tolled for equitable reasons. This suit was therefore allowed to continue. The defendant now, however, has presented arguments which, at least at first blush, raise

serious questions as to whether the facts of this case mandate a tolling of the limitations period. This issue has not been thoroughly briefed by the plaintiff here, and because I find the defendant is entitled to summary judgment based upon the Section 4(f)(2) exception, I find it unnecessary to decide the question.

Accordingly, I find the involuntary retirement of plaintiff on June 1, 1977 in accordance with Caterpillar's retirement plan was not unlawful. The defendant's motion for summary judgment is therefore allowed.

Enter this 25 day of March, 1980.

(s) J. Waldo Ackerman
United States District Judge

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1615

DONALD H. GONSALVES,

Plaintiff-Appellant,

v.

CATERPILLAR TRACTOR COMPANY, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Central District of Illinois, Springfield Division.
No. 79-C-1084—J. Waldo Ackerman, *Judge*.

ARGUED SEPTEMBER 26, 1980—DECIDED NOVEMBER 24, 1980

Before PELL, *Circuit Judge*, SKELTON, *Senior Judge*,* and WOOD, *Circuit Judge*.

WOOD, *Circuit Judge*. This case involves plaintiff Gonsalves's appeal from a district court ruling that granted defendant Caterpillar Tractor Company's (Caterpillar's) motion for summary judgment and dismissed Gonsalves's claim that Caterpillar violated the Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. No. 95-256, 81 Stat. 602 (1967), 29 U.S.C. § 621 *et seq.*, when it terminated his employment in 1977 by involuntary retirement at the age of fifty-nine. The sole issue before us is whether ADEA as it stood in 1977

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* The Honorable Byron G. Skelton, Senior Judge of the United States Court of Claims, sitting by designation.

permitted an employer discretion to involuntarily retire an employee before the mandatory age specified in a long-standing pension agreement, where the express terms of the agreement allowed involuntary retirement. We affirm.

Section 4(a)(1) of ADEA provides that

> It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Section 4(f)(2) in 1977[1] provided that

> It shall not be unlawful for an employer . . . to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual.

29 U.S.C. § 623(f)(2).

On this appeal Gonsalves contends that the provisions of section 4(f)(2) apply only to the portions of an employer's pension plan that deals with mandatory retirement based on an employee's age. Gonsalves argues that since Caterpillar exercised some discretion when it retired him against his will before the mandatory age specified in Caterpillar's pension plan, section 4(f)(2) does not shield the company from liability under ADEA.

As it appears from the facts pleaded and admitted before the district court when it granted the summary judgment motion, Caterpillar's pension plan provided for mandatory retirement at age sixty-six and early retirement at the employee's option after thirty years of

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[1] Gonsalves argued at the district court level that 1978 amendments to ADEA should be given retroactive effect and should govern the present case. He has abandoned that contention on appeal.

service or at age sixty-two. The affidavit of Caterpillar's Employee Benefits Manager stated that Caterpillar's employees are subject to involuntary retirement after age fifty if they have ten years' credited service or after thirty years' credited service regardless of age. Although he now asserts that there are no documents in the record to support the Manager's explanation of the pension plan's terms, Gonsalves did not contest that point before the district court. In fact he presumed it to be true in his answer to Caterpillar's motion for summary judgment, and we accept the point as true for purposes of this appeal. *See Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973).

The parties agree that the plan was a bona fide one since it actually paid out benefits. The plan was not a subterfuge within the meaning of ADEA since it was established decades before the passage of ADEA. *See United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977).

Gonsalves argues that Caterpillar was not passively "observing" the terms of the pension plan under section 4(f)(2) when it retired him involuntarily. Instead, he claims, Caterpillar was taking affirmative steps that impermissibly allowed age to become a potential factor in the retirement decision. Recent cases in this circuit have discussed when a company "observes" terms of a pension plan within the meaning of section 4(f)(2). *Sexton v. Beatrice Foods Co.*, No. 79-1661 (7th Cir. August 7, 1980); *Smart v. Porter Paint Co.*, No. 80-1028 (7th Cir. August 7, 1980). In considering the United States Supreme Court's decision in *United Airlines, Inc. v. McMann, supra*, the court in *Sexton* observed that "[b]oth the majority and dissenting opinions in McMann make sense only on the premise that the § 4(f)(2) exception is applicable only where the scope of involuntary termination is expressly provided for in an employer's retirement plan." Slip op. at 8. And in *Smart v. Porter Paint Co., supra*, the court restated the *Sexton* case's holding when it said that "for an employer to 'observe the terms' of a retirement plan when it forces an employee to retire, either the plan must contain a mandatory retirement age or the plan must grant the

employer the right to force retirement at an appropriate age of his choosing." Slip op. at 7. In the case before us, plaintiff specifically acknowledged that "*Under the terms of* the Defendant's Retirement Income Plan, an employee is subject to involuntary retirement after attainment of age fifty (50) and ten (10) years of credited service. . . ." (Plaintiff's Response to Defendant's Motion for Summary Judgment, p. 7.) (Emphasis supplied.) In light of the *Sexton* and *Smart* cases, the record as it stands in this case shows that Caterpillar's retirement plan expressly provides for the scope of involuntary termination, that Caterpillar "observed" the terms of the plan and that, therefore, the section 4(f)(2) exception applies.

The *Sexton* and *Smart* opinions (and our decision in this case) are consistent with cases that indicate it is not a violation for the employer to retire an employee at the mandatory retirement age even though the employer could retain other employees past that age. *See, e.g., United Airlines v. McMann*, 434 U.S. at 197 n.4; *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974). In those situations, the employee knows the date at which he may be retired, like it or not, but also knows that his employer may exercise an option to retain his services past that time if the employee agrees. As the court observed in *Sexton*, "one of the paramount purposes of a retirement plan or program is to put employees on notice when they may reasonably expect to be terminated, or retired." Slip op. at 21. Once the employer's pension plan puts the employee on notice of the time at which he may be retired, so long as that age is a reasonable one the employee is in the same situation as one who faces mandatory retirement only: the employee knows at what point the retirement decision may be made. Thus, "an employee having realistic notice that he may face early retirement may have an opportunity to make provision through savings, through the securing of a second job, and otherwise for the contingencies which he faces." *Sexton*, slip op. at 22. When the age for mandatory retirement arrives, the employee may be as loath to leave as he would have been had the employer exercised the earlier involuntary retirement option. The fact that the employee leaves against his will at an

earlier time does not alter the similarity of the two situations of retirement, nor does it change the perception of fairness, *see Sexton*, slip op. at 21, involved in the employer's decision whether or not to retain the employee, so long as notice is given in both situations.

We acknowledge that there may be some greater opportunity for age considerations to enter the retirement decision when an early retirement system is involved. But section 4(f)(2) as it stood in 1977 permitted existing involuntary early retirement plans to continue in operation, so long as the terms of the plan were clear to employees. This view accords with decisions reached in this and other circuits on the application of the original version of ADEA to involuntary early retirement plans. *See Minton v. Whirlpool Corp.*, 569 F.2d 1012 (7th Cir. 1978); *Marshall v. Hawaiian Telephone Co.*, 575 F.2d 763 (9th Cir. 1978); *Zinger v. Blanchette*, 549 F.2d 901 (3d Cir. 1977). And the 1977 version of ADEA did not "require employers to bear the burden of showing a business or economic purpose to justify bona fide pre-existing plans." *McMann*, 434 U.S. at 203.

Gonsalves cites three district court cases that have construed section 4(f)(2) not to cover retirements under pension plans similar to that involved in this case. We will discuss these cases in some detail because the parties to this suit indicated fundamental disagreement over the meaning and vitality of the cases, and because this circuit has not yet considered what impact, if any, the cases have on its conclusions regarding ADEA.[2]

In the first case cited by Gonsalves, *Marshall v. American Motors Corp.*, 475 F. Supp. 875 (E.D. Mich. 1979), the district court judge held that with the passage of ADEA "one element of the employer's discretion was removed. That was the right to consider age as a relevant factor in the decision to terminate an employee." *Id.* at 880. The judge went on to acknowledge that ADEA broadly provided for an exception

[2] The *Smart* case cited *Marshall v. American Motors Corp.*, 475 F. Supp. 875 (E.D. Mich. 1979), without discussion. *Smart*, slip op. at 7.

in the case of a bona fide plan that is not a subterfuge to evade the law. The judge then asserted that it would violate Congressional intent to let stand the discretionary aspect of the employer's bona fide plan. The district court did not articulate what specific aspects of "Congressional intent" overrode the plain language of section 4(f)(2), compare *Braunstein v. Commissioner*, 374 U.S. 65 (1963), nor did the judge explain how even *mandatory* retirements upheld in the *McMann* case could survive the test she set forth, since under mandatory plans age is *the* "relevant factor" used to determine when an employee must retire. On that basis, and considering our previous discussion in this case, we find the district court's reasoning in the *American Motors* case unpersuasive, and decline Gonsalves's invitation to adopt the conclusions set out in that case.

In *Hannan v. Chrysler Motors Corp.*, 443 F. Supp. 802 (E.D. Mich. 1978), the district court judge found that Chrysler violated ADEA when it retired Hannan as part of a blanket cutback by Chrysler of employees over fifty-five years of age. Chrysler had argued that it was observing an involuntary retirement option in its pension plan. The district court judge in *Hannan* interpreted the section 4(f)(2) term "observe" to refer to an employer's passive acquiescence to mandatory retirement provisions of a pension plan, citing the dissent in *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974). The *Taft Broadcasting* majority upheld involuntary retirements under an employer's plan virtually identical to the one at issue in this case. Given this circuit's interpretation of the term "observe" as used in section 4(f)(2) and the absence of authority for the *Hannan* court's definition of the term, we find the reasoning of the *Hannan* case to be unpersuasive.[3]

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[3] The district court opinion in another case cited by Gonsalves adopted the definition of "observe" as used by the district court judge in *Hannan*. *Langman v. Western Electric Co.*, ___ F. Supp. ___ (S.D.N.Y. 1980), 23 FEP 1222. For the reasons discussed above, we decline Gonsalves's invitation to adopt that definition.

In *Cowlishaw v. Armstrong Rubber Co.*, 450 F. Supp. 148 (E.D.N.Y. 1978), the district court denied the employer's motion for summary judgment in a case that dealt with an involuntary early retirement. The district court judge described at some length several decisions involving ADEA, including the *McMann* and *Minton* cases, but did not explain how those decisions fit the judge's own conclusions in the case before him. Instead, the district court in *Cowlishaw*, apparently referring to *Hannan*, stated that the widespread use of existing early retirement provisions to lighten an employer's payroll costs "is very far from what the Congress had in mind when it" enacted section 4(f)(2). *Id.* at 153. The district court concluded that section 4(f)(2) does not automatically exclude from ADEA coverage every early retirement under the terms of pre-existing pension plans, but rather that in certain unspecified cases the employer need *not* show that early retirement was due to some factor unrelated to age. The district court then said that the employee must show that his termination *was* based solely on his age. The district court judge did not attempt to reconcile his conclusions as to the proof required from the employee under ADEA with his conclusions that some plans are excluded from ADEA regardless of the showing made by an employer. Without stating what circumstances in the case before the court governed the ruling, the district court judge held that the plaintiff had established sufficient facts to warrant denial of the defendant's motion for summary judgment. Thus, the judge in *Cowlishaw* apparently rejected this circuit's decision in *Minton*, *supra*, but did not provide authority for his own conclusions. We find the *Cowlishaw* case unpersuasive in light of this circuit's recent discussion in the *Sexton* and *Smart* cases as to the showing necessary to allow an employer successfully to invoke section 4(f)(2) in the face of age discrimination claims brought under ADEA.

Here it is undisputed that the terms of Caterpillar's bona fide pension plan allowed for early retirement of Gonsalves at Caterpillar's option. The plan was not a subterfuge to avoid the mandates of ADEA, and Gonsalves had notice of the terms of the plan. The

district court's granting of Caterpillar's motion for summary judgment was consistent with ADEA as it stood in 1977 and is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4969—Midwest Law Printing Co., Inc., Chicago—11-24-80—350

No.

JAN 19 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD H. GONSALVES, Petitioner,

vs.

CATERPILLAR TRACTOR CO., Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Section 4(f)(2) of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §621 et seq., as originally enacted, and as it stood in 1977, permitted an employer discretion to involuntarily retire an employee before the mandatory age specified in a long-standing bona fide pension agreement predating the ADEA, where the express terms allowed the employer discretion to invoke involuntary retirement.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CATERPILLAR TRACTOR CO. ("CATERPILLAR") submits this brief in opposition to the Petition for a Writ of Certiorari filed by Donald H. Gonsalves ("Gonsalves"), Petitioner herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit which is reprinted as pages 1b through 8b of Appendix B to the Petition is reported at 24 FEP Cases 687 (7th Cir., 1980). The Opinion of the United States District Court for the Central District of Illinois which is reprinted as pages 1a through 5a of Appendix A to the Petition is reported at 22 FEP Cases 967 (C.D. Ill., 1980). The opinions are not as yet reported in West Publishing Co.'s System.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition (Pet. V).

STATUTE INVOLVED

Only Section 4(f)(2) of the Age Discrimination in Employment Act of 1967 is at issue in this appeal. That provision is set forth in the Petition (Pet. vi).

STATEMENT OF THE CASE

Effective June 1, 1977, Petitioner Donald H. Gonsalves ("Gonsalves") terminated his employment as a manager at one of Respondent's facilities. At the time of his retirement, Gonsalves was 59 years of age and had worked for Caterpillar for some forty years. Caterpillar's pension plan provided, *inter alia,* for involuntary retirement after the age of fifty if an employee had 10 years credited service or after thirty years credited service regardless of age. Almost two years after the severence of his employment, Gonsalves filed the Complaint, the outcome of which is the subject of the instant Petition. Gonsalves alleged in Count I of his two Count Complaint that Caterpillar violated the provisions of the Age Discrimination in Employment Act of 1967 (ADEA) with respect to the termination of Gonsalves' employment. Caterpillar answered the Complaint and set up eleven affirmative defenses. Thereafter, Caterpillar moved the District Court to enter an Order granting Caterpillar Summary Judgment on the basis that, for the purposes of that Motion only, Caterpillar could not have violated ADEA even if it had involuntarily retired Gonsalves solely on the basis of his age since, in 1977, Section 4(f)(2) of ADEA expressly permitted such action by an employer under the circumstances applicable to Gonsalves' separation—even were it called an involuntary retirement. Plaintiff argued that Section 4(f)(2) authorized involuntary retirement only in cases where the plan expressly required retirement under specific factual circumstances. Thus, Gonsalves asserted that when a Plan only permitted an employer to involuntarily retire an employee, but under those circumstances did not require such action, such a non-mandatory retirement fell outside the 4(f)(2) exemption and was therefore proscribed by the Act. In the Trial Court, Gonsalves also argued that the 1978 ADEA

amendments which, *inter alia* included the revocation of the 4(f)(2) exemption should be given retroactive application. The Trial Court granted Defendant's Motion for Summary Judgment, and dismissed Gonsalves' Complaint. On appeal, Gonsalves abandoned his arguments concerning retroactivity of the 1978 amendments. The Seventh Circuit Court of Appeals affirmed the District Court and held that as was the case in the fact situation presented herein, Section 4(f)(2) permitted an involuntary early retirement initiated solely at the employer's option, so long as the Plan itself provided the employer with this right, and the Plan was bonafide.

REASONS FOR DENYING WRIT

There is no important question of Federal Law concerning the application of 29 U.S.C. Section 623(f)(2) as originally enacted which need be addressed by the United States Supreme Court.

The issue faced by the Courts below herein was very narrow. It pertained solely to the interpretation to be applied to Section 4(f)(2) of ADEA as originally enacted. Because Section 4(f)(2) was repealed and not supplanted by the 1978 amendments to ADEA, only cases of involuntary retirement arising prior to 1978 could be affected by any decision rendered herein. In view of the fact that ADEA contains specific time limits governing the times during which ADEA actions and conditions precedent thereto must be invoked, the number of pending cases similar to the instant dispute is very limited. The precedential value of a decision dealing with a statutory provision which has not been in existence for some three years is virtually non-existent. No important federal policy program or procedure would be served in review of a statutory provision which no longer exists.

Most importantly, however, the fact is that the precise issue decided by the District Court and the Court of Appeals herein, has been before other Courts of Appeals. In each case the Courts in the Third, Fifth and Ninth Circuits have expressly ruled that insofar as Section 4(f)(2) is concerned, no difference exists between Plans which require retirement and those in which an employer may decide who among its employees, if anyone, it will involuntarily retire. Thus, Caterpillar's actions herein would meet the approval in panels deciding: *Jensen v. Gulf Oil Refining Co.*, 623 F.2d 406 (5th Cir., 1980); *Minton v. Whirlpool Corp.*, 569 F.2d 1012 (7th Cir., 1978); *Marshall v. Hawaiian Telephone Co.*, 575 F.2d 763 (9th Cir., 1978) and *Zinger v. Blanchette*, 549 F.2d 901 (3rd Cir., 1977). No Circuit Court of Appeals has rendered a decision in conflict with the principles set forth herein and there is no conflict between the Circuits as to the interpretation of the 4(f)(2) provision under such circumstances.

A Writ of Certiorari would be inappropriate in these circumstances.

CONCLUSION

Wherefore, for all of the foregoing reasons, the Petition for a Writ of Certiorari to the United States Supreme Court should be denied.

Respectfully submitted,

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